# Industrial Property Management Sdn Bhd v Forebase Property Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO WA-22NCVC-644–10 OF 2020
MOHD NAZLAN J
13 JULY 2021

*Civil Procedure — Interrogatories — Admissions and interrogatories — Application to compel answers for interrogatories — Whether plaintiff referred to correct provision in application — Whether procedural non-compliance was fatal — Whether plaintiff satisfied test of necessity — Whether application was redundant and oppressive — Whether application was a fishing expedition — Whether interrogatories meritorious — Whether application was regular, competent and sustainable — Rules of Court 2012 O 26 rr 1, 2, 6*

This was an application to compel answers for interrogatories filed by the plaintiff against the defendants in a writ action. The plaintiff was the owner of a three-storey bungalow erected on the piece of land identified as Geran 34048, Lot No 620, Seksyen 67, Kuala Lumpur ('Lot 620'). The first defendant was the developer of the Hemmon House project on Lot 621, which was adjacent to Lot 620. The second defendant was the contractor which carried out foundation works for the Hemmon House project. According to the second defendant, prior to its commencement of construction works, another firm of P-Con Building Surveyors Sdn Bhd, appointed by the second defendant had on various occasions in August and September 2017, requested access from the plaintiff to conduct pre-construction survey on the plaintiff's Lot 620. This was however refused by the plaintiff on the basis that the three-storey bungalow on Lot 620 was undergoing rectification works at the material time. After the commencement of foundation works, the plaintiff alleged that its three-storey bungalow suffered damage as a result of the foundation works carried out by the second defendant. This resulted in the filing of a writ action by the plaintiff claiming losses and damages against the first defendant pursuant to among others, the tort of nuisance, and against the second defendant pursuant to, inter alia, the tort of negligence. In conjunction with the writ, the plaintiff then on 18 January 2021 served a set of interrogatories, consisting of a total of 94 questions ('interrogatories') to the two defendants. The first defendant was asked to answer questions 1–8, 10–54, 56–75, and 77–90. The second defendant was asked to respond to questions 1, 9–53, 55–74, 76–86, and 91–94. The defendants responded by way of affidavit, answered some of the questions in the interrogatories but declined to reply to several others on account of what the defendants considered as them being oppressive and a fishing expedition. Dissatisfied, and alleging 'insufficient answers' by the

defendants, on 23 February 2021, the plaintiff filed the notice of application under O 26 r 6 of the Rules of Court 2012 ('the ROC 2012') to compel the defendants to answer all of the questions in the interrogatories. Hence, this instant application before the court. The issue that arose for determination, inter alia, was whether O 26 r 6 could be invoked to get the court to compel compliance with the interrogatories when the questions had earlier been posed to the defendants before close of pleadings under O 26 r 2, or that O 26 r 6 could only be applied when the interrogatories were issued with leave of court under O 26 r 1.

**Held**, dismissing the application with costs:

(1) The court was of the view, procedurally, an ordered interrogatories (meaning, under O 26 r 1) ought to have been obtained from court before the plaintiff sought to now apply for an order under O 26 r 6(1) to compel compliance. Insufficient answers to 'ordered interrogatories' under O 26 r 1 were to be dealt with differently than those to 'interrogatories without order' under O 26 r 2. As such, O 26 r 6 was not the common answer to both situations. More accurately, this also meant that the answers by the defendants to the interrogatories served on them under O 26 r 2 could not be construed as 'insufficient answer' within the context of O 26 r 6(1) (see paras 24 & 27).

(2) It was essential that the plaintiff referred to the correct provision in the application. Non-compliance rendered the application defective and unsustainable, incurable and procedurally fatal. The plaintiff had merely made reference to O 26 r 6 which was inapplicable at this stage but did not and in fact failed to refer to O 26 r 1(1) and (3) in the present application. This alone rendered the application for an order to compel answers to interrogatories to be irregular and incurable. The irregularity here was not merely technical but so patently fundamental and was fatal to this application. It was also not curable by the provisions of O 1A and 2 of the ROC 2012 because O 26 r 6 could only be invoked on the basis of an insufficient answers to court — ordered interrogatories, which was not the case here. On this ground alone, the application must be dismissed (see paras 32–34).

(3) The plaintiff failed to satisfy the court that the application was in fact necessary to save time and costs for the trial. Instead, it was more of a fishing expedition. As such, not only did the plaintiff fail to satisfy the test of necessity, but this application was also doubly redundant and oppressive against the defendants, a form of a fishing expedition, and even pertained to answers that could be obtained during trial of the matter. As such, the interrogatories as applied for against both the first

A and second defendants were unmeritorious for the failure of the plaintiff to fulfil the requirements under O 26 r 1(1) and 1(3) of the ROC 2012 (see paras 69–70).

**[Bahasa Malaysia summary**

B Ini adalah permohonan untuk memaksa jawapan bagi interogatori yang difailkan oleh plaintif terhadap defendan dalam tindakan writ. Plaintif merupakan pemilik banglo tiga tingkat yang didirikan di atas sekeping tanah berketerangan Geran 34048, Lot No 620, Seksyen 67, Kuala Lumpur ('Lot 620'). Defendan pertama adalah pemaju projek Rumah Hemmon di Lot 621, C yang bersebelahan dengan Lot 620. Defendan kedua adalah kontraktor yang menjalankan kerja-kerja asas untuk projek Rumah Hemmon. Menurut defendan kedua, sebelum kerja-kerja pembinaan dimulakan, sebuah lagi firma P-Con Building Surveyors Sdn Bhd, yang dilantik oleh defendan kedua telah D beberapa kali pada Ogos dan September 2017, memohon akses daripada plaintif untuk menjalankan tinjauan prapembinaan ke atas Lot 620 plaintif. Ini bagaimanapun ditolak oleh plaintif atas dasar banglo tiga tingkat di Lot 620 sedang menjalani kerja-kerja baik pulih pada masa material. Selepas kerja-kerja asas dimulakan, plaintif mendakwa banglo tiga tingkatnya mengalami E kerosakan akibat kerja-kerja asas yang dijalankan oleh defendan kedua. Ini mengakibatkan pemfailan tindakan writ oleh plaintif yang menuntut kerugian dan ganti rugi terhadap defendan pertama menurut antara lain, tort kacau ganggu, dan terhadap defendan kedua menurut, antara lain, tort kecuaian. Lanjutan daripada writ tersebut, plaintif kemudiannya pada 18 Januari 2021 F menyerahkan satu set interogatori, yang terdiri daripada sejumlah 94 soalan ('interogatori') kepada kedua-dua defendan. Defendan pertama diminta menjawab soalan 1–8, 10–54, 56–75, dan 77–90. Defendan kedua diminta menjawab soalan 1, 9–53, 55–74, 76–86, dan 91–94. Defendan membalas melalui afidavit, dengan menjawab beberapa soalan dalam interogatori tetapi G enggan menjawab beberapa soalan lain kerana defendan menganggap ianya menindas dan 'fishing expedition'. Tidak berpuas hati, dan mendakwa 'jawapan tidak mencukupi' oleh defendan, pada 23 Februari 2021, plaintif memfailkan notis permohonan di bawah A 26 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk memaksa defendan menjawab semua soalan dalam H interogatori. Oleh itu, permohonan semasa ini di hadapan mahkamah. Isu yang timbul untuk ditentukan, antara lain, adalah sama ada A 26 k 6 boleh digunapakai untuk mendapatkan mahkamah untuk memaksa pematuhan terhadap interogatori apabila soalan telah dikemukakan kepada defendan sebelum penutupan pliding di bawah A 26 k 2, atau A 26 k 6 hanya boleh I digunakan apabila interogatori telah dikeluarkan dengan kebenaran mahkamah di bawah A 26 k 1.

**Diputuskan**, menolak permohonan dengan kos:

(1) Mahkamah berpendapat, dari segi prosedur, interogatori yang

diperintahkan (bermaksud, di bawah A 26 k 1) sepatutnya diperoleh daripada mahkamah sebelum plaintif memohon untuk memohon perintah di bawah A 26 k 6(1) untuk memaksa pematuhan. Jawapan yang tidak mencukupi untuk 'interogatori yang diperintahkan' di bawah A 26 k 1 harus ditangani secara berbeza daripada jawapan kepada 'interogatori tanpa perintah' di bawah A 26 k 2. Oleh yang demikian, A 26 k 6 bukanlah jawapan yang biasa untuk kedua-dua situasi. Lebih tepat lagi, ini juga bermakna bahawa jawapan oleh defendan kepada interogatori yang disampaikan kepada mereka di bawah A 26 k 2 tidak boleh ditafsirkan sebagai 'jawapan tidak mencukupi' dalam konteks A 26 k 6(1) (lihat perenggan 24 & 27).

(2) Ia adalah penting bahawa plaintif merujuk kepada peruntukan yang betul dalam permohonan tersebut. Ketidakpatuhan menyebabkan permohonan tersebut cacat dan tidak dapat dipertahankan, tidak boleh dibetulkan dan memudaratkan secara prosedur. Plaintif hanya membuat rujukan kepada A 26 k 6 yang tidak terpakai pada peringkat ini tetapi tidak dan sebenarnya gagal merujuk kepada A 26 k 1(1) dan (3) dalam permohonan semasa. Ini sahaja menyebabkan permohonan perintah untuk memaksa jawapan kepada interogatori menjadi tidak teratur dan tidak boleh dibetulkan. Ketidakteraturan di sini bukan semata-mata teknikal tetapi sangat asas dan memudaratkan kepada permohonan ini. Ia juga tidak dapat dibetulkan oleh peruntukan A 1A dan 2 KKM 2012 kerana A 26 k 6 hanya boleh digunakan berdasarkan jawapan yang tidak mencukupi kepada mahkamah — memerintahkan interogatori, yang tidak berlaku di sini. Atas alasan ini sahaja, permohonan harus ditolak (lihat perenggan 32–34).

(3) Plaintif gagal membuktikan mahkamah bahawa permohonan tersebut sebenarnya perlu untuk menjimatkan masa dan kos untuk perbicaraan. Sebaliknya, ia lebih kepada 'fishing expedition'. Oleh itu, bukan sahaja plaintif gagal memenuhi ujian keperluan, tetapi permohonan ini juga berlebihan berganda dan menindas terhadap defendan, satu bentuk 'fishing expedition', dan juga berkaitan dengan jawapan yang boleh diperolehi semasa perbicaraan perkara tersebut. Oleh itu, interogatori seperti yang dipohon terhadap defendan pertama dan kedua adalah tanpa merit kerana kegagalan plaintif memenuhi keperluan di bawah A 26 r 1(1) dan 1(3) KKM 2012 (lihat perenggan 69–70).]

**Cases referred to**

*American Flange and Manufacturing Co Inc v Rheem (Aust) Pty Ltd (No 2)* [1965] NSWR 193, SC (refd)

*Lee Nui Foon v Ocean Park Corp (No 2)* [1995] 2 HKC 395, HC (refd)

*Liputan Canggih Sdn Bhd & Ors v K&A Management Sdn Bhd & Ors* [2019] MLJU 1882, HC (folld)

A *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46; [2010] 6 CLJ 172, CA (refd)
*Overseas Chinese Banking Corp Ltd v Norman Wright & Ors* [1989] 3 MLJ 73, HC (refd)
B *Pertubuhan Berita Nasional Malaysia v Stephen Kalong Ningkan* [1980] 2 MLJ 19, FC (folld)
*Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng* [1975] 1 MLJ 89, FC (refd)
*Shum Kai Cheong v See Too Woon Yee* [1998] 4 MLJ 155, HC (refd)
C *Wright Norman & Anor v Oversea-Chinese Banking Corp Ltd and another appeal* [1992] 2 SLR 710, CA (refd)
*Zaini bin Che Awang & Ors v Pegawai Penerima Syarikat Cosmopro Planner Sdn Bhd* [2015] 11 MLJ 410, HC (refd)

D **Legislation referred to**

Evidence Act 1950 ss 5, 6, 7, 8, 9, 10, 11, 12
Rules of Court 2012 O 1A, O 2, O 26 rr 1 1(1), 1(1)(b), (3), 2, 6, 6(1)

E *Chetan Jethwani (Goh Hui Ring with him) (Goh Partnership) for the plaintiff.*
*WL Wong (Shaun Lee with him) (Tunku Farik & Wong) for the first defendant.*
*SK Liow (Jennifer Lai with him) (Liow & Co) for the second defendant.*

**Mohd Nazlan J:**

F INTRODUCTION

**[1]** This is an application to compel answers for interrogatories filed by the plaintiff against the defendants in this writ action.

G **[2]** At the conclusion of the hearing which was conducted via *Zoom* video technology, I dismissed the same and highlighted the principal grounds for the dismissal. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

H

**[3]** The plaintiff is the owner of a three-storey bungalow erected on the piece of land identified as Geran 34048, Lot No 620, Seksyen 67, Kuala Lumpur bearing postal address of No 217 Jalan Imbi, 55100 Kuala Lumpur ('Lot 620').

I

**[4]** The first defendant is the developer of the Hemmon House project on Lot 621, which is adjacent to Lot 620. The second defendant is the contractor which carried out foundation works for the Hemmon House project.

**[5]** According to the second defendant, prior to its commencement of construction works, another firm of P-Con Building Surveyors Sdn Bhd, appointed by the second defendant had on various occasions in August and September of 2017, requested access from the plaintiff to conduct pre-construction survey on the plaintiff's Lot 620. This was however refused by the plaintiff on the basis that the three-storey bungalow on Lot 620 was undergoing rectification works at the material time.

**[6]** After the commencement of foundation works, the plaintiff alleged that its three-storey bungalow suffered damage as a result of the foundation works carried out by the second defendant.

**[7]** This resulted in the filing of a writ action by the plaintiff claiming losses and damages against the first defendant pursuant to among others, the tort of nuisance, and against the second defendant pursuant to, inter alia, the tort of negligence.

**[8]** In conjunction with the writ, the plaintiff then on 18 January 2021 served a set of interrogatories, consisting of a total of 94 questions ('interrogatories') to the two defendants. The first defendant was asked to answer questions 1–8, 10–54, 56–75, and 77–90. The second defendant was asked to respond to questions 1, 9–53, 55–74, 76–86, and 91–94. The defendants responded by way of affidavit, answered some of the questions in the interrogatories but declined to reply to several others on account of what the defendants considered as them being oppressive and a fishing expedition.

**[9]** Dissatisfied, and alleging 'insufficient answers' by the defendants, on 23 February 2021, the plaintiff filed the notice of application under O 26 r 6 of the Rules of Court 2012 ('the ROC 2012') to compel the defendants to answer all of the questions in the interrogatories.

**[10]** Hence this instant application before me.

THE PRINCIPAL GROUNDS FOR THE APPLICATION

**[11]** The plaintiff highlighted that while both defendants have filed affidavits in response to the interrogatories that had been served on them, the averments provided by both the defendants are non-responsive to the questions posed. The plaintiff alleged that they were evasive and failed or refused to answer the majority of questions posed in the interrogatories. In other words, they defendants have answered the interrogatories insufficiently and inadequately. This has necessitated the plaintiff filing this application to compel answers to the interrogatories. And this application to compel answers

for interrogatories is in relation to the unanswered questions that had already been posed in the interrogatories, with no new questions.

**[12]** As such the plaintiff submitted that its application ought to be allowed because all the questions in the interrogatories are to elicit admission from the defendants and are relevant to the issues in dispute in the present case, and that they will serve the purpose of shortening the length of trial and saving costs. The interrogatories are targeted questions to seek specific answers and admissions of material facts and are not a fishing expedition.

**[13]** The defendants on the other hand opposed the interrogatories and this application, and argued that the interrogatories are a fishing expedition because the questions posed are too general or vague and that the facts or documents referred to, are not pleaded, identified or raised in the pleadings. It was also asserted that the plaintiff does not have any knowledge of the existence of such facts, information or parties and is merely trying to find out if they exist, and that some of the issues are not relevant to the present dispute.

ANALYSIS AND FINDINGS OF THIS COURT

*The procedural basis of the application*

**[14]** I think it is most appropriate if the procedural basis of this application by the plaintiff be clearly established given that this is also a key complaint of the defendants against the instant application before me.

**[15]** The plaintiff based its present application under O 26 r 6 to compel the defendants to answer the interrogatories on the basis that it had earlier invoked O26 r 2 of the ROC 2012 which provides that a party is entitled to discovery by interrogatories without the leave of court before the close of pleadings.

**[16]** The defendants however argued that this is wrong, as the correct application should have been one to issue and serve for interrogatories pursuant to O 26 r 1(1) and (3) of the ROC 2012.

**[17]** The plaintiff retorted that O 26 r 1 has no application in the present instance because the provision is only applicable to issuance and service of interrogatories after the close of pleadings where prior leave of court must first be obtained before any questions may be posed to the opposing party. In this case, the interrogatories were issued before the close of pleadings as of right without leave of court pursuant to O 26 r 2, rendering O 26 r 1 inapplicable.

**[18]** The plaintiff, I emphasise, anchored the application on O 26 r 6 which states that if the person whom had been served with interrogatories answers

them insufficiently, the court has the power to order and require such person to provide further answers by way of affidavit or on an oral examination. This is thus the basis of the application by the plaintiff seeking this court to issue an order to compel the defendants under O 26 r 6 to answer all the questions in the interrogatories sent under O 26 r 2.

**[19]** The plaintiff maintained that if the interrogatories are issued before close of pleadings, it is made as a matter of right under O 26 r 2. Conversely, if it is not done before the close of pleadings, then O 26 r 1 applies wherein leave of court is required. Rule 1 involves the discretion of court and such discretion will have to exercise judiciously. In the present case, the interrogatories had already been issued and properly served on both the defendants, and the defendants have in fact provided some answers to the said interrogatories, albeit insufficiently.

**[20]** The plaintiff argued therefore that it need not have to apply under O 26 r 1 for an order of court for the 'reissuance' of the interrogatories, since that would render O 26 r 2 to be ineffective and tantamount to an abuse of process of court. Instead now the plaintiff seeks an order of court to compel sufficient answers for the interrogatories to be provided by both the defendants, under O 26 r 6.

**[21]** It is quite clear to me that the dispute on this point between the plaintiff and the defendants is in relation to the issue whether O 26 r 6 can be invoked to get the court to compel compliance with the interrogatories when the questions had earlier been posed to the defendants (but allegedly insufficiently answered) before close of pleadings under O 26 r 2 (which crucially does not require leave of court) like pursued by the plaintiff herein or that O 26 r 6 can only be applied when the interrogatories are issued with leave of court under O 26 r 1 (after close of pleadings).

**[22]** The provisions in O 26 rr 1 and 2 read as follows:

> 26 interrogatories
>
> 1 Discovery by interrogatories (O 26 r 1)
>
> (1) A party to any cause or matter may apply in Form 44 to the court for an order —
>
> (a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter; and
>
> (b) requiring that other party to answer the interrogatories on affidavit within a specific period of time which shall not be less than fourteen days from the date of service of the interrogatories.

(2) A copy of the proposed interrogatories in Form 45 shall be served together with the application for such leave.

(3) On the hearing of an application under this rule, the court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave, the court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.

(4) A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness.

(5) If an order is made, it shall be in Form 46 and shall be served by the applicant on the party against whom it is made.

(6) interrogatories shall be answered by affidavit in Form 47 and the affidavit shall be filed and a copy thereof served on the party interrogating within the time specified in the order.

2 Discovery by interrogatories without leave of court (O 26 r 2)

A party to any cause or matter may at any time before the close of pleadings without the leave of the court deliver interrogatories relating to any matter in question between the parties.

**[23]** And O 26 r 6 states the following:

6 Insufficient answer (O 26 r 6)

(1) If any person on whom interrogatories have been served answers any of them insufficiently, the court may make an order requiring him to make a further answer, either by affidavit or on oral examination as the court may direct.

(2) Where any person, on whom interrogatories without order have been served, answers any of them insufficiently, the party serving the interrogatories may ask for further and better particulars of the answer given.

**[24]** In my view, procedurally, an ordered interrogatories (meaning, under O 26 r 1) ought to have been obtained from court before the plaintiff sought to now apply for an order under O 26 r 6(1) to compel compliance.

**[25]** In the first place, I observed that O 26 r 6 itself, as set out above, draws a distinction between r 6(1) and r 6(2) where only the former refers to the power of the court to order the answers be given following insufficiently answered interrogatories, but no similar reference is made in the latter, which specifically concerns interrogatories without order of court, in which case the

course of action for insufficient answers is to ask for further and better particulars of the answers given.

**[26]** Further, the second defendant was correct in making reference to the *Malaysian Rules of Court 2012, An Annotation* by Lexis Nexis which when discussing O 26, at p 545 states:

> 26/6/3 Procedure. The procedure to be followed ... where ordered interrogatories have been served on a party and he answers 'any of them insufficiently', the court may make an order under r 6(1) requiring that party 'to make a further answer, either by affidavit or an oral examination' ...
>
> If interrogatories are served without order and the party who is served answers any of them insufficiently, the party serving may ask for further and better particulars of the answers given. If further and better particulars are not forthcoming, the party making the request may apply to court for the appropriate order.

**[27]** This plainly confirms, fairly definitively in my view that insufficient answers to 'ordered interrogatories' under O 26 r 1 are to be dealt with differently than those to 'interrogatories without order' under O 26 r 2. As such, O 26 r 6 is not the common answer to both situations. More accurately, this also means that the answers by the defendants to the interrogatories served on them under O 26 r 2 cannot be construed as 'insufficient answer' within the context of O 26 r 6(1).

**[28]** In my view, in any event, a more complete answer is found in the case of *Liputan Canggih Sdn Bhd & Ors v K&A Management Sdn Bhd & Ors* [2019] MLJU 1882 where Wong Kian Kheong J instructively analysed the very issue as follows:

> [11] I am of the following view regarding the court's power to order interrogatories under O 26 rr 1 to 3 of the ROC 2012:
>
> (1) the court has a discretionary power to order interrogatories or otherwise under O 26 rr 1(1), 1(3), 1(4) and 3 of the ROC 2012 (not pursuant to O 26 r 2 of the ROC 2012);
>
> (2) the court should only exercise its discretion to order interrogatories when the interrogatories are necessary to:
>
> (a) dispose fairly the case (first Limb); or
>
> (b) save costs (second Limb).
>
> ...
>
> Reading together O 26 rr 1, 3, O 34 r 9(1) and (2) of the ROC 2012, a party should apply for interrogatories as soon as reasonably possible after discovery of documents under O 24 of the ROC 2012;
>
> (3) the court may exercise its discretion to refuse an interrogatories application if

there is an unexplained and unreasonable delay in making such an application — please refer to Abdul Kadir Sulaiman J's decision in the High Court case of *Shum Kai Cheong v See Too Woon Yee* [1998] 4 MLJ 155, at p 160;

(4) the party applying for interrogatories, bears the burden to satisfy the court to exercise its discretion in favour of the application;

(5) cases on applications for interrogatories concern the exercise of judicial discretion which depends on the particular facts of each case. Accordingly, judgments on interrogatories applications are purely illustrative and have no binding effect from the perspective of the stare decisis doctrine; and

(6) *before the close of pleadings, by virtue of O 26 r 2 of the ROC 2012, a party (X) may deliver interrogatories without leave of the court relating to any matter in question between the parties on an opposing party (Y). In such a case:*

(a) Y may answer X's interrogatories; or

(b) *if Y refuses to answer X's interrogatories, X has to apply to court pursuant to O 26 r 1(1) and (3) of the ROC 2012 for an order to compel Y to answer X's interrogatories. This is because there is nothing in O 26 r 2 of the ROC 2012 [unlike O 26 r 1(1)(b), (3), (6) of the ROC 2012] which compels Y to answer X's interrogatories. I am not able to find any case which has construed O 26 r 2 of the ROC 2012 in a manner wherein Y is compelled to answer X's interrogatories merely because X's interrogatories have been delivered before the close of pleadings*. (Emphasis added.)

**[29]** A proper application of the rules would demand the plaintiff if it had first served the interrogatories on the defendants pursuant to O 26 r 2 and became dissatisfied with the answers furnished by the defendants, to first file an application under O 26 r 1, or to instead seek for further and better particulars. It is wrong for the plaintiff to have by-passed O 26 r 1, and now directly applied for the invocation of O 26 r 6. This is also because as held in *Liputan Canggih*, O 26 r 2 does not compel the defendants to answer the interrogatories.

**[30]** It should be emphasised that the reliefs under the plaintiff's interrogatories to now compel answers be given would also fall squarely within the scope of O 26 r 1(1)(b) which, as set out above states that a party to any cause may apply to the court for an order requiring that the other party to answer the interrogatories on affidavit within a specific period of time which shall not be less than fourteen days from the date of service of the interrogatories. Which is why the plaintiff ought to have first applied for an order for interrogatories under this O 26 r 1.

**[31]** O 26 r 1 is a key provision which confers on the court the discretionary power to order interrogatories or otherwise. When an application is made after the close of pleadings under this O 26 r 1, a satisfactory explanation for the delay is a prerequisite for the court to grant leave for interrogatories. This was

made clear in the High Court decision in *Shum Kai Cheong v See Too Woon Yee* [1998] 4 MLJ 155 where it was held thus:

> ... Under r 2, a party to any cause or matter may at any time before the close of the pleadings without leave of the court deliver interrogatories relating to any matter in question between the parties, which means that if made before the close of the pleading, it is made as a matter of right. Whereas, if not so done at that stage, then r 1 would apply wherein leave of the court is required. In other words, leave is only necessary when made after the close of the pleadings, as happens in this present case before me. Rule 1 involves the discretion of the court in deciding whether to grant or refuse the leave sought. Like any other discretion, it is to be exercised judiciously on settled principles as otherwise the need to come before the court for leave becomes a mockery. The first thing that an applicant in such a situation would face is to satisfactorily explain to the court as to why it was not done as so provided by r 2 to call for the need to come to court for leave. Thus the satisfactory explanation for the delay is a prerequisite ...

**[32]** It is essential that the plaintiff refers to the correct provision in this application. Non-compliance renders this application defective and unsustainable, incurable and procedurally fatal. As aptly referred to by the defendants, in *Zaini bin Che Awang & Ors v Pegawai Penerima Syarikat Cosmopro Planner Sdn Bhd* [2015] 11 MLJ 410 the High Court observed that one has to be specific and not generalise in stating under which order or rule one is making and not expect that 'one size fits all' for any or every application one makes to the court. An application must accurately and specifically refer to the provisions or order on which the application is based.

**[33]** The plaintiff had merely made reference to O 26 r 6 which is inapplicable at this stage but did not and in fact fail to refer to O 26 r 1(1) and (3) in the present application. This alone renders the application for an order to compel answers to interrogatories to be irregular and incurable. The Court of Appeal in *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46; [2010] 6 CLJ 172, in the judgment written by Abdul Malik Ishak JCA succinctly observed:

> ... a failure to comply with the requirement of the rules would be treated as an irregularity and is curable. But the court has no power to remedy an irregularity which is fundamentally defective. Thus, the failure to include an intitulement of the rule of court or statute under which the court is moved cannot be remedied (*Kanciltek (M) Sdn Bhd v Mayban Finance Bhd (No 1)* [2001] 6 MLJ 185 at p 192; [2001] 6 CLJ 254 at p 262; [2000] 4 AMR 4960, at p 4969).

**[34]** The irregularity here, in the context of this case, is not merely technical but so patently fundamental and is fatal to this application. It is also not curable by the provisions of O 1A and 2 of the ROC 2012 because O 26 r 6 can only be invoked on the basis of an insufficient answers to court — ordered

A interrogatories which is not the case here. On this ground alone, this application must be dismissed.

*The merits of the application*

B **[35]** Although the application is defective and incompetent and has been dismissed on that ground, I shall for completeness, also consider the merits of the application, albeit in summary fashion.

C **[36]** As stated earlier, in denying the interrogatories are a fishing expedition, the plaintiff maintained that the questions posed are both specific and targeted, and they related to, amongst others:

(a) the type of works and progress of the works in relation to the Hemmon House project on Lot 621 including the date of commencement of works as well as progress of works for the period during the months of September 2017 to April 2018;

D

(b) the submissions of work progress reports to the project consultants;

(c) the nature and the extent of the pre-construction surveys or post damage reports carried out and/or caused to be carried out by the defendants on the surrounding areas of Lot 621 including Lot 620;

E

(d) the information pertaining to meetings held to discuss the damage to the plaintiff's land and building on Lot 620 including the dates of such meetings, the parties present as well as whether there were any minutes of meeting kept;

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(e) complaints made by other parties in relation to the works at Lot 621;

(f) the information pertaining to what the respective defendants did upon the receipt of the plaintiff's letter dated 10 November 2017 informing the defendants of the extent of damage suffered at the plaintiff's building on Lot 620 and/or the receipt of complaints made by other parties other than the plaintiff;

G

(g) information pertaining to whether the works at the Hemmon House project on Lot 621 was stopped during the period between November 2017 to December 2019 and if so the date of such stop works order and the resumption of works thereafter; and

H

(h) the party who had instructed for such stop works order and the reasons for doing so.

I

**[37]** These questions, according to the plaintiff, are necessary and relevant to establish the time of material facts as well as to establish the degree and extent of knowledge, control and the respective liability of the defendants. It is also

relevant as such facts and information will support the plaintiff's rebuttal of the defendants' defences. The questions are targeted and directed to specific issues or timeline.

**[38]** The plaintiff submitted, in my view correctly, that the test of relevancy is a broad one. The relevancy provisions are provided for in ss 5 through 12 of the Evidence Act 1950. A fact is relevant if it establishes a fact in issue. A fact is also relevant if those facts are supportive of the establishing of a fact in issue and, crucially, if those facts rebut or negate a fact in issue.

**[39]** It is therefore immaterial whether the questions posed are pertaining to a particular fact that has been pleaded or otherwise. Instead, as long as the questions seek to elicit answers which will have a connection or bearing on a fact in issue that will support the plaintiff's pleaded case or rebut the defendants' defences, such questions are therefore relevant and not a fishing expedition. interrogatories can either relate to pleaded facts in issue to a proceeding or to other facts which have a bearing on those facts in issue.

**[40]** In Federal Court decision in *Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng* [1975] 1 MLJ 89 had decided that whilst the interrogatories ought to confine to matters which are in issue, under some circumstances interrogatories may extend to facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue. Gill CJ (Malaya) stated the following:

> The view which we took was that although interrogatories much be confined to matters which are in issue, they may under some circumstances extend to facts the existence or non-existence of which is relevant to the existence non-existence of the facts directly in issue (see *Marriott v Chamberlain* [1886] 17 QBD 154; *Osram Lamp Works Ltd v Gabriel Lamp Co* [1914] 2 Ch 129). In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs. In our judgment the interrogatories in this case satisfied all those tests.

**[41]** This application, as I have determined earlier, should have been properly brought under O 26 r 1 and for this purpose, the plaintiff must satisfy the necessity test for all the questions of the interrogatories put to the defendants. The plaintiff must convince the court that the interrogatories are necessary either for disposing fairly of the cause or matter or for saving costs.

**[42]** The essence of the rules on interrogatories is encapsulated in the following statement of the Federal Court in *Sheikh Abdullah Bin Sheikh Mohamed*:

A In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs.

See also *Liputan Canggih*.

B

**[43]** When focus be made on the interrogatories directed at the second defendant, particularly concerning the construction work progress reports, the plaintiff could not however show how exactly the construction work progress reports prepared by the second defendant at the Hemmon House project could C in any way serve a clear litigious path of the matter during trial.

**[44]** Furthermore, I think it is not denied and ought to be stressed that the actual dispute in this case involves primarily technical engineering and geotechnical issues. But whether the information and reports sought by the D plaintiff in the interrogatories have any true bearing on such technical issues remain tentative at best.

**[45]** Nor has the plaintiff provided the requisite particulars of the negligence E alleged against the second defendant. Instead the interrogatories even involve requests for information on complaints made by third party (if any). This also shows that the interrogatories have veered outside the focus of the plaintiff's claims against the defendant, and appear more like an elaborately pursued fishing expedition.

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**[46]** The answers to most of the interrogatories could I agree be obtained from the expert witnesses during cross examination at trial especially concerning the earth retaining structure at the boundary wall, the foundation works as well as the piling system carried out at the Hemmon House project on G Lot 621.

**[47]** I am thus more than inclined to take the view that in this case, especially given the importance of the technical matters in the resolution of the dispute, which may necessitate detailed geo-technical and competent engineering H explanation, the nature of the interrogatories issued by the plaintiff seem more appropriate to be put to the witnesses during the trial instead. After all there are many authorities which held that if the admission of a fact can be proved by a witness who will be called at the trial, interrogatories will not, as a rule, be allowed because it will not save but on the contrary, add to costs.

I

**[48]** In a leading case of *Overseas Chinese Banking Corp Ltd v Norman Wright & Ors* [1989] 3 MLJ 73 (a decision affirmed on appeal in [1992] 2 SLR 710) the Singapore High Court, in a judgment by Chao Hick Tin JC (as he then was) observed as follows:

> The first question for my consideration is whether the first and third defendants should be given leave to serve the interrogatories on the plaintiffs. Generally, interrogatories are admissible if they come to support the applicant's case or to impeach or destroy the opponent's case. The object of interrogatories is to 'see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been': see Cotton LJ in *AG v Gaskill* [1881] 20 Ch D 519 at p 528. Obviously each case has to be decided in the light of the facts set out and/or issues raised in the pleadings. *In any event, interrogatories will only be allowed as shall be considered necessary either for disposing fairly of the cause or matter, or for saving costs. If the admission of a fact can be proved by a witness who will be called at the trial, interrogatories will not, as a rule, be allowed because it will not save but add to costs*. (Emphasis added.)

**[49]** Further, in some of the earlier answers provided by the second defendant it was averred that there were already pre-existing damages on the three-storey building on Lot 620, which was well before the second defendant commenced any construction works on Lot 621.

**[50]** No evidence however had been offered by the plaintiff to show the existence or non-existence of those foundational facts to the interrogatories. There is therefore basis to the contention that the interrogatories are somewhat presumptuous since the pre-existing damages on the three-storey building on Lot 620 remains a live issue, which ought rightfully to be first established at the trial. Any attempt to interrogate pursuant to damages on Lot 620 before the pre-existing damages is determined may thus tantamount to a fishing expedition.

**[51]** In this regard, reference may usefully be made to the case of *Pertubuhan Berita Nasional Malaysia v Stephen Kalong Ningkan* [1980] 2 MLJ 19, where Chang Min Tat FJ for the former Federal Court instructively stated as follows:

> Where there is nothing in the case to show any foundation for the suggestion that a defendant has uttered any defamatory statements of the plaintiff beyond the one particularised in the statement of claim and the plaintiff is endeavouring by means of these interrogatories to find out whether the defendant has said the same thing or substantially the same thing to other persons, then an application to administer interrogatories for the purpose of ascertaining whether there are these other persons would be of a fishing character: *Barham v Lord Huntingfield* [1913] 2 KB 193.

**[52]** The question of whether the interrogatories are designed to obtain admissions of relevant facts which will reduce the issues and whether they demonstrate that they will serve a clear litigation purpose by saving costs and promoting fair trial are not answered in the affirmative when consideration be made of the plaintiff's interrogatories Nos, 1, 8, 11–12, 17–18, 20, 22–42, 44–47, 49–54, 56–75 and 77–90 which were directed at the first defendant, some of which were as follows:

| Interrogatory No | Information or Evidence requested |
|---|---|
| 1 | the commencement date for the development of Hemmon House Project. |
| 8 | the contractual relationship between the first defendant and the owner of Lot 621. |
| 11–12 | whether regular progress reports were issued in respect of the Hemmon House Project? |
| 17–18 | the relationship between Perunding Jurutera and the first defendant and the purpose of appointment. |
| 20 | whether pre-construction condition survey was carried out at other nearby premises? |
| 22–27 | (i) what is the scope of pre-construction survey at the plaintiff's premises?<br>(ii) any survey reports issued and who were the recipient?<br>(iii) any action taken by the first defendant upon receiving the survey reports? |
| 28–42 and 44 | (i) whether contiguous bored pile wall and piling systems were used for the constructions of the Hemmon House Project? Who were the proposal, designer, approver and execute of the contiguous bored pile wall and piling systems?<br>(ii) what were the safety engineering protocols and construction standards adopted for the design and approval of the contiguous bored pile wall and piling systems?<br>(iii) was there alternative design proposed for the contiguous bored pile wall and piling system? Who were the proposal and designer? What is the reason for rejection of the alternative design? |
| 47 and 49–53 | (i) the commencement date of the substructure and physical work at Hemmon House Project.<br>(ii) what were the initial works carried out by the second defendant and who inspects, approves, evaluates, assess the works? |
| 54 | when did the first defendant first come to know about the damage suffered at the plaintiff's premises? |

| | |
|---|---|
| 56–60 and 70–74 | (i) any meeting(s) held between the first defendant, second defendant and/or their professional consultant in relation to the damage suffered at the plaintiff's premises?<br>(ii) what were the dates, attendees and discussions of the meeting(s)?<br>(iii) any minutes recorded for the meeting(s)? |
| 61–69 | (i) what works were being carried out at the Hemmon House Project when the damage at the plaintiff's premises was discovered?<br>(ii) what works were being carried out at the Hemmon House Project from September 2017 to April 2018 (specify each month)? |
| 75 and 77–79 | (i) were there any other complaints apart from the plaintiff's pertaining to the Hemmon House Project? What is the nature of complaints and who were the complaint(s)?<br>(ii) what did the first defendant do to address such complaint(s)? |
| 80–83 | (i) whether stop work order had been issued to Hemmon House Project?<br>(ii) who issued the stop work order?<br>(iii) when were the works stopped and resumed between September 2017 and December 2019 (identify each date)?<br>(iv) why were the works stopped and resumed on each occasion? |
| 84–86 | (i) whether perunding jurutera, DPE Consultant Sdn Bhd, other engineers or third party consultant had been appointed to assess the damage at the plaintiff's premises?<br>(ii) any report(s) issued (including but not limited to any preliminary findings) and when was it issued? |

**[53]** Whilst they may at first blush appear to be reasonable questions, in the context of the rules on interrogatories, I find that the plaintiff has not demonstrated in what manner each question in the interrogatories will be able to achieve the abovementioned objectives of obtaining admissions of relevant facts which will reduce the issues or that they will serve a clear litigation purpose by saving costs and promoting a fair trial.

**[54]** I cannot therefore but agree with the first defendant that on the contrary, the interrogatories, with 72 questions in total (directed at the first

A defendant) which are broad and extensive in nature, instead are not so much designed to obtain admission of facts to relieve the plaintiff from the necessity of adducing evidence, but rather to procure the first defendant to furnish the plaintiff with the information that the plaintiff was unsure even as to its existence.

B

**[55]** As an example, the plaintiff averred that the interrogatories are necessary to identify the progress and type of construction work and actions performed by the first defendant and that the interrogatories are important to identify the chronology of events and the parties involved. But this shows C nothing but that the plaintiff did not know whether such facts, information or parties are in existence. That is fishing expedition.

**[56]** And as the first defendant has mentioned, vis a vis interrogatories Nos 28–42 and 44, as above, the plaintiff was clearly was not in the know of the D method and measures the defendants had undertaken for the foundation works. As the defendants submitted, these questions were effectively asking the defendants 'please tell us why you have not taken this step or employed this method/design for the foundation work so that I could show negligence on your part and thus substantiate my case against you'.

E

**[57]** This is exactly the situation that this court should not countenance for the interrogatories here reeks of a fishing expedition. In *Overseas Chinese Banking Corp Ltd v Norman Wright & Ors*, the High Court observed as follows:

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> It seems to me abundantly clear that the thrust of this whole set of interrogatories is in Nos 6 and 7. The first and third defendants in their defence allege that the plaintiffs had been negligent. As I have pointed out above, they have not set out any specific particulars of negligence. If they had particularized specific instances of negligence, then interrogatories could be raised on those specific particulars of G negligence. Without particulars, they cannot interrogate. The further particulars which the first defendant furnished clearly show that the first defendant did not know what measures the plaintiffs had failed to undertake. *By interrogatories nos 6 and 7, the defendants are, in effect, asking the plaintiffs, 'please tell us what steps you have not taken so that I could show negligence on your part and thus substantiate my comment as fair comment.' In my opinion, the interrogatories sought by the first and* H *third defendants are in truth a clear case of fishing. This cannot be allowed. They hope, through this process, to be able to stumble upon something which will show that their comment was fair or even enabled them to plead justification. This is not a legitimate function of interrogatories*. (Emphasis added.)

I

**[58]** Additionally, the plaintiff is also via the interrogatories requesting the defendants on matters which the plaintiff already had knowledge of, such as on the meetings where the plaintiff was involved, and given that the relevant minutes of the meetings were already in the possession of the plaintiff even prior to the issuance of the interrogatories produced to the defendants.

**[59]** The interrogatories, I reiterate, this time referable to the first defendant, also concerned technical matters that require the assistance and confirmation of the experts, consultant or engineers, such as on interrogatories Nos 22–27 regarding the scope of pre-construction survey at the plaintiff's premises, and interrogatories Nos 28–42, 44 on the design, construction and safety of the foundation works carried out at the Hemmon House project. Again, I repeat that such questions should be posed directly to the experts when they are called to testify at the trial.

**[60]** This is thus also an appropriate case, for the reasons stated above, that attracts the proposition that if the admission of a fact can be proved by a witness who will be called at the trial, interrogatories will not be allowed because they would instead add to the costs. Thus the answers to interrogatories Nos 22, 22–42, 44–47, 49–53, 61–69, 75 and 77–90 are more suited to be given by way of viva voce evidence at the full trial, following *Overseas Chinese Banking Corp Ltd v Norman Wright & Ors*.

**[61]** I am not unmindful that it has been held, for example, in *Sheikh Abdullah bin Sheikh Mohamad* that it is not necessarily a good ground or basis to refuse to answer any interrogatories just because the answers can be obtained through cross examination at trial. And it is also true that the mere fact that the applicant has knowledge does not mean that interrogatories cannot be issued, because the objective of interrogatories is to enable the applicant to obtain admissions from the other party and so to relieve himself from the necessity of adducing evidence.

**[62]** But whether leave in any particular case ought to be granted for any interrogatories is dependent on the exercise of discretion. And it is trite that every case is different. In this case it has been found that many of the questions in the interrogatories are fishing in nature. Some are premised on unproven facts, and a number of others are dependent on expert evidence. All these only fortify the decision not to grant leave for an order for interrogatories because the plaintiff did not succeed in demonstrating necessity for the interrogatories within the requirements of O 26 r 1of the ROC 2012 (let alone O 26 r 6 which requires O 26 r 1 being first invoked to begin with).

**[63]** Additionally, the interrogatories also relate to the records and documents of the defendants which would require a considerable time and costs for the relevant parties such as the experts, consultants and engineers to verify by having to review the said information and documents. These include interrogatories Nos 56–60 and 70–74 which asked about the dates, attendees, discussions of the meeting(s) between the defendants and their experts; interrogatories Nos 61–69 on the specific type and extent of works carried out at the Hemmon House project from September 2017 to April 2018; and

A interrogatories Nos 80–83 respecting the specific dates and reasons for which works at Hemmon House project were ordered to stop and then to resume between November 2017 and December 2019.

B **[64]** On the whole therefore, the interrogatories are unduly oppressive because they require inordinate amount of time, effort and cost to review and obtain the information requested before the defendants could proffer a reply or answer to each of the questions posed.

C **[65]** This is because, given the circumstances of the case, it appears that the long list of interrogatories in this application imposes on the defendants a burden of answering which exceeds one that is deemed as a reasonable limits of a set of interrogatories, considering not only the usefulness or otherwise of the answers, but also the attendant expense, inconvenience, and trouble arising therefrom (see the Hong Kong case of *Lee Nui Foon v Ocean Park Corp (No 2)* [1995] 2 HKC 395). It has also been held that interrogatories which are prolix or which contain many objectionable questions may also be deemed as oppressive (see the Australian case of *American Flange and Manufacturing Co Inc v Rheem (Aust) Pty Ltd (No 2)* [1965] NSWR 193).

D

E **[66]** So too are the interrogatories Nos 1, 54 and 61 are lacking in clarity and altogether vague, in the absence of specificity on what the plaintiff described as 'damage suffered' where like in the questions directed at the second defendant, it was merely assumed by the plaintiff that the damage at its premises has been established to be caused by the defendants. It is difficult if not impossible for the defendants to answer questions such as these.

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G **[67]** Moreover, it seems that interrogatories Nos 1, 20, 75 and 77–79 are irrelevant if not wholly unnecessary because they do not truly concern the claim by the plaintiff. Their only true value seems to be for a fishing expedition.

H **[68]** Merely repeating that the interrogatories are relevant to establish the liability of the defendants or to rebut the defence by the defendants but without more would do little to fulfil the requirements under O 26 r 1. It instead further demonstrates that the plaintiff was hoping to uncover something, or anything, that could be employed against the defendants. This, again is a fishing expedition.

I **[69]** I therefore cannot but conclude that the plaintiff fails to satisfy this court that the application is in fact necessary to save time and costs for the trial. Instead, it is more of a fishing expedition. As such not only did the plaintiff fail to satisfy the test of necessity, but that this application is also doubly redundant and oppressive against the defendants, a form of a fishing expedition, and even pertain to answers that could be obtained during trial of the matter.

**[70]** As such the interrogatories as applied for against both the first and second defendants are unmeritorious for the failure of the plaintiff to fulfil the requirements under O 26 r 1(1) and (3) of the ROC 2012.

CONCLUSION

**[71]** In view of the foregoing analysis, I have found that the application pursued by plaintiff to compel answers be given to its interrogatories of 94 questions under O 26 r 6 is incompetent and defective and warrants the dismissal of the same. And that in any event, neither could the plaintiff establish its application is meritorious under O 26 r 1 let alone under O 26 r 6. The application in encl 2 is therefore dismissed with costs to the defendants.

*Application dismissed with costs.*

Reported by Nuzul Fitrie